

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

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EMPYREAN GENERAL PARTNER, LLC,
ASH MASTER FUND II, LLC, ASH
MASTER FUND, LP, ASH FUND, LP,
f/k/a ASH CAPITAL MANAGEMENT,
ASH GENERAL PARTNER, LLC, ASH
OFFSHORE FUND, LTD, ASH GENERAL
PARTNER OFFSHORE, LTD, et al.

Defendants-Appellants

v.

Docket No. 08-cv-06936

ALAN NISSELSON and OFFICIAL
COMMITTEE OF UNSECURED
CREDITORS,
Plaintiff-Appellees.

**APPELLANTS' STATEMENT OF ISSUES
AND DESIGNATION OF RECORD ON APPEAL**

Pursuant to Federal Rule of Bankruptcy Procedure 8006, the defendants-appellants, Empyrean Investment Fund, LP, Empyrean General Partner, LLC, Ash Master Fund II, LLC, Ashe Master Fund, LP, Ash Fund, LP, f/k/a Ash Capital Management, Ash General Partner, LLC, Ash Offshore Fund, Ltd, Ash General Partner Offshore, Ltd, et al, (hereinafter "defendants") respectfully submit the following statement of issues and designation of items to

be presented on appeal to the United States District Court for the Southern District of New York, pursuant to 28 U.S.C. § 158(a)(1), from an October 12, 2007 Memorandum of Opinion Regarding Motion for Summary Judgment and a November 9, 2007 Final Judgment and Order thereon.

Statement of Issues on Appeal

1. Whether the Bankruptcy Court erred in allowing summary judgment for the plaintiff-appellees (hereinafter “plaintiffs”) alleging a fraudulent transfer where:
 - a. The defendants asserted that the complex transaction generated crucial liquidity which, in the unique circumstances, provided fair value;
 - b. The plaintiff failed to adduce expert testimony concerning the question of value and offered no evidence concerning the value of the “liquidity”;
 - c. Both the debtor and defendant affirmatively denied any intent to hinder or delay creditors; and
 - d. There was a material question of fact regarding the debtor’s good faith.
2. Whether the Bankruptcy Court erred in failing to consider that the intent of the allegedly fraudulent transactions was preservation of the debtor’s contractual rights to a potential \$180,000,000.00 “earn out”.
3. Whether the Bankruptcy Court erred in failing to treat the involved transactions as an integrated whole;
4. Whether summary judgment should have been denied pursuant to Rule 56(f);
5. Whether the Bankruptcy Court erred in denying the defendant’s motion for expert and attorney fees;

6. Whether the Bankruptcy Court erred in denying the defendant's claims to the Epoch estate; and
7. Whether the Bankruptcy Court erred in its finding of contempt.

Designation of the Record¹ on Appeal from Adversary Proceeding Case No. 05-01268-ALG, before the United States Bankruptcy Court for the Southern District of New York

Item No.	Date	Document No.	Description
1	11/03/06	250	Motion for Summary Judgment /Plaintiffs' Joint Motion For Summary Judgment filed by Lester M. Kirshenbaum on behalf of Official Committee of Unsecured Creditors of MarketXT Holdings Corp.. with hearing to be held on 11/21/2006 (check with court for location) Responses due by 11/17/2006, (Kirshenbaum, Lester) (Entered: 11/03/2006)
2	11/03/06	252	Memorandum of Law /Plaintiff's Memorandum Of Law In Support Of Their Joint Motion For Summary Judgment (related document(s) 251) filed by Lester M. Kirshenbaum on behalf of Official Committee of Unsecured Creditors of MarketXT Holdings Corp.. (Kirshenbaum, Lester) (Entered: 11/03/2006)
3	11/03/06	253	Statement / Plaintiffs' Rule 7056-1 Statement Of Undisputed Facts To Joint Motion For Summary Judgment filed by Lester M. Kirshenbaum on behalf of Official Committee of Unsecured Creditors of MarketXT Holdings Corp.. (Kirshenbaum, Lester) (Entered: 11/03/2006)
4	11/03/06	254	Statement / Compendium Of Trial Testimony To Plaintiffs' Rule 7056-1 Statement Of Undisputed Facts To Joint Motion For Summary Judgment [1 Of 2] (related document(s) 253 , 252 , 251) filed by Lester M. Kirshenbaum on behalf of Official Committee of Unsecured Creditors of MarketXT Holdings Corp.. (Kirshenbaum, Lester) (Entered: 11/03/2006)
5	11/03/06	255	Statement / Compendium Of Trial Testimony To

¹ Each item designated includes all documents referenced within the particular document number including, without limitation, all exhibits, attachments, proposed orders and declarations related thereto.

			Plaintiffs' Rule 7056-1 Statement Of Undisputed Facts To Joint Motion For Summary Judgment [2 Of 2] (related document(s) 254 , 253 , 252 , 251) filed by Lester M. Kirshenbaum on behalf of Official Committee of Unsecured Creditors of MarketXT Holdings Corp.. (Kirshenbaum, Lester) (Entered: 11/03/2006)
6	11/03/06	256	Statement / Compendium Of Exhibits To Plaintiffs' Rule 7056-1 Statement Of Undisputed Facts To Joint Motion For Summary Judgment [1 Of 3] (related document(s) 255 , 254 , 253 , 252 , 251) filed by Lester M. Kirshenbaum on behalf of Official Committee of Unsecured Creditors of MarketXT Holdings Corp.. (Kirshenbaum, Lester) (Entered: 11/03/2006)
7	11/03/06	257	Statement / Compendium Of Exhibits To Plaintiffs' Rule 7056-1 Statement Of Undisputed Facts To Joint Motion For Summary Judgment [2 Of 3] (related document(s) 255 , 254 , 253 , 252 , 256 , 251) filed by Lester M. Kirshenbaum on behalf of Official Committee of Unsecured Creditors of MarketXT Holdings Corp.. (Kirshenbaum, Lester) (Entered: 11/03/2006)
8	11/03/06	258	Statement / Compendium Of Exhibits To Plaintiffs' Rule 7056-1 Statement Of Undisputed Facts To Joint Motion For Summary Judgment [3 Of 3] (related document(s) 255 , 254 , 253 , 252 , 257 , 256 , 251) filed by Lester M. Kirshenbaum on behalf of Official Committee of Unsecured Creditors of MarketXT Holdings Corp.. (Kirshenbaum, Lester) (Entered: 11/03/2006)
9	11/03/06	259	Statement / Compendium Of Deposition Transcripts To Plaintiffs' Rule 7056-1 Statement Of Undisputed Facts To Joint Motion For Summary Judgment [1 Of 2] (related document(s) 255 , 254 , 253 , 252 , 257 , 256 , 258 , 251) filed by Lester M. Kirshenbaum on behalf of Official Committee of Unsecured Creditors of MarketXT Holdings Corp.. (Kirshenbaum, Lester) (Entered: 11/03/2006)
10	11/03/06	260	Statement / Compendium Of Bank Statements To Plaintiffs' Rule 7056-1 Statement Of Undisputed Facts To Joint Motion For Summary Judgment (related document(s) 255 , 259 , 254 , 253 , 252 , 257 , 256 , 258 , 251) filed by Lester M. Kirshenbaum on behalf of Official Committee of Unsecured Creditors of MarketXT Holdings Corp..

			(Kirshenbaum, Lester) (Entered: 11/03/2006)
11	11/08/06	264	Statement / Compendium of Deposition Transcripts To Plaintiffs' Rule 7056-1 Statement Of Undisputed Facts To Joint Motion For Summary Judgment [2 of 2] (related document(s) 255 , 259 , 254 , 253 , 252 , 260 , 257 , 256 , 258 , 251) filed by Lester M. Kirshenbaum on behalf of Official Committee of Unsecured Creditors of MarketXT Holdings Corp.. (Kirshenbaum, Lester) (Entered: 11/08/2006)
12	11/10/06	266	Motion to Extend Time for Submitting Defendants' Opposition to Plaintiffs' Motion for Summary Judgment filed by Jeffrey A. Denner on behalf of the Defendants. (Denner, Jeffrey) (Entered: 11/10/2006)
13	11/20/06	267	Order Signed on 11/20/2006 Extending Time for Defendants' Response (related document(s) 266) (Porter, Marguerite) (Entered: 11/20/2006)
14	12/12/06	274	Motion to Compel the Production of Documents filed by Jeffrey A. Denner on behalf of the Defendants. with hearing to be held on 1/9/2007 (check with court for location) Responses due by 1/8/2007, (Denner, Jeffrey) (Entered: 12/12/2006)
15	12/22/06	278	Motion to Allow Release of a Portion of the Restrained Funds in Order to Complete the Process of Retention of Experts and for Legal Fees filed by Jeffrey A. Denner on behalf of the Defendants. with hearing to be held on 1/25/2007 (check with court for location) Objections due by 1/16/2007, (Attachments: # 1 Affirmation of Robert Sinsheimer in Support of Petition for Fees# 2 Affidavit of Rauf Ashraf in Support of Petition for Fees) (Denner, Jeffrey) (Entered: 12/22/2006)
16	01/08/07	282	Objection to Motion Plaintiffs' Objection to Defendants' Motion to Compel Production of Documents (related document(s) 274) filed by Lester M. Kirshenbaum on behalf of Alan Nisselson. with hearing to be held on 1/9/2007 (check with court for location) (Attachments: # 1 Exhibit A# 2 Exhibit B# 3 Exhibit C# 4 Exhibit D) (Kirshenbaum, Lester) (Entered: 01/08/2007)
17	01/11/07	285	Motion for Adjournment of Oral Argument on Summary Judgment Due to Scheduling Conflict and for Very Brief Final Continuance for the Filing of Opposition to Summary Judgment filed by Jeffrey A. Denner on behalf of the Defendants. (Denner, Jeffrey) (Entered: 01/11/2007)

18	01/12/07	287	Order Signed on 1/12/2007 Denying Defendants' Motion to Compel Production of Documents (Related Doc # 274) (Porter, Marguerite) (Entered: 01/12/2007)
19	01/22/07	288	Affidavit of Rauf Ashraf in Support of Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for Summary Judgment (related document(s) 251) filed by Jeffrey A. Denner on behalf of the Defendants. (Attachments: # 1 Index Table of Contents to Exhibits# 2 Exhibit A# 3 Exhibit B# 4 Exhibit C# 5 Exhibit D# 6 Exhibit E# 7 Exhibit F# 8 Exhibit G# 9 Exhibit H)(Denner, Jeffrey) (Entered: 01/22/2007)
20	01/22/07	289	Affidavit Exhibits to Affidavit of Rauf Ashraf in Support of Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for Summary Judgment (related document(s) 288) filed by Jeffrey A. Denner on behalf of the Defendants. (Attachments: # 1 Exhibit I-1# 2 Exhibit I-2# 3 Exhibit I-3# 4 Exhibit J# 5 Exhibit K# 6 Exhibit L# 7 Exhibit M# 8 Exhibit N# 9 Exhibit O-1)(Denner, Jeffrey) (Entered: 01/22/2007)
21	01/22/07	290	Affidavit Exhibits to Affidavit of Rauf Ashraf in Support of Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for Summary Judgment (related document(s) 288) filed by Jeffrey A. Denner on behalf of the Defendants. (Attachments: # 1 Exhibit O-2# 2 Exhibit P# 3 Exhibit Q# 4 Exhibit R# 5 Exhibit S# 6 Exhibit T# 7 Exhibit U# 8 Exhibit V# 9 Exhibit W)(Denner, Jeffrey) (Entered: 01/22/2007)
22	01/22/07	291	Affidavit Exhibits to Affidavit of Rauf Ashraf in Support of Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for Summary Judgment (related document(s) 288) filed by Jeffrey A. Denner on behalf of the Defendants. (Attachments: # 1 Exhibit X# 2 Exhibit Y# 3 Exhibit Z# 4 Exhibit AA# 5 Exhibit BB# 6 Exhibit CC# 7 Exhibit DD# 8 Exhibit EE# 9 Exhibit FF# 10 Exhibit FF#)(Denner, Jeffrey) (Entered: 01/22/2007)
23	01/22/07	292	Affidavit Exhibits to Affidavit of Rauf Ashraf in Support of Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for Summary Judgment (related document(s) 288) filed by Jeffrey A. Denner on behalf of the Defendants.

			(Attachments: # 1 Exhibit GG# 2 Exhibit HH# 3 Exhibit II# 4 Exhibit JJ# 5 Exhibit KK# 6 Exhibit MM# 7 Exhibit OO-1# 8 Exhibit OO-2# 9 Exhibit QQ)(Denner, Jeffrey) (Entered: 1/22/2007)
24	01/22/07	293	Memorandum of Law in Opposition to Plaintiffs' Joint Motion for Summary Judgment (related document(s) 251) filed by Jeffrey A. Denner on behalf of the Defendants. (Denner, Jeffrey) (Entered: 01/22/2007)
25	01/22/07	294	Statement of Undisputed Facts in Opposition to Summary Judgment filed by Jeffrey A. Denner on behalf of the Defendants. (Denner, Jeffrey) (Entered: 01/22/2007)
26	02/02/07	295	Statement / Plaintiffs' Rule 7056-1 Statement of Undisputed Facts to Joint Motion For Summary Judgment (related document(s) 255 , 288 , 259 , 254 , 253 , 293 , 252 , 290 , 264 , 260 , 289 , 257 , 256 , 294 , 258 , 251 , 292 , 291) filed by Lester M. Kirshenbaum on behalf of Official Committee of Unsecured Creditors of MarketXT Holdings Corp.. (Kirshenbaum, Lester) (Entered: 02/02/2007)
27	02/02/07	296	Reply to Motion Plaintiffs' Reply Memorandum of Law in Further Support of their Joint Motion for Summary Judgment (related document(s) 251) filed by Alan Nisselson on behalf of Alan Nisselson, Official Committee of Unsecured Creditors. (Nisselson, Alan) (Entered: 02/02/2007)
28	02/20/07	300	Motion to Extend Time – Motion for Very Brief Adjournment of Oral Argument on Pending Motions Due to Scheduling Conflict filed by Jeffrey A. Denner on behalf of the Defendants. (Denner, Jeffrey) (Entered: 02/20/2007)
29	02/20/07	301	Memorandum of Law / Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion Allowing Release of Restrained Funds (related document(s) 278 , 280) filed by Lester M. Kirshenbaum on behalf of Official Committee of Unsecured Creditors of MarketXT Holdings Corp.. (Attachments: # 1 Exhibits A and B) (Kirshenbaum, Lester) (Entered: 02/20/2007)
30	02/20/07	302	Declaration of Margarita Y. Ginzburg (related document(s) 301) filed by Lester M. Kirshenbaum on behalf of Official Committee of Unsecured Creditors of MarketXT Holdings Corp.. with hearing to be held on 2/26/2007 (check with court for location) (Attachments: # 1 Exhibits 1 through

			34) (Kirshenbaum, Lester) (Entered: 02/20/2007)
31	02/21/07	303	Opposition (related document(s) 300) filed by Alan Nisselson on behalf of Alan Nisselson, Official Committee of Unsecured Creditors. (Nisselson, Alan) (Entered: 02/21/2007)
32	02/21/07	305	Motion to Amend and Supplement Defendants' Rule 7056-1 Omnibus Statement of Material Disputed Facts filed by Jeffrey A. Denner on behalf of the Defendants. (Attachments: # 1 Defendants' First Amended and Supplemented Rule 7056-1 Omnibus Statement of Material Disputed Facts) (Denner, Jeffrey) (Entered: 02/21/2007)
33	02/22/07	306	Order Signed on 2/22/2007 Regarding Motion to Extend Time (Related Doc # 300) (Porter, Marguerite) (Entered: 02/22/2007)
34	02/23/07	309	Motion to Strike Plaintiff's Untimely Opposition to Defendants' Motion Allowing Release of Restrained Funds (related document(s) 301) filed by Jeffrey A. Denner on behalf of the Defendants. (Attachments: # 1 Exhibit A – Letter to Judge Gropper, dated February 15, 2007) (Denner, Jeffrey) (Entered: 02/23/2007)
35	02/27/07	311	Memorandum Endorsed Order signed on 2/27/2007, Denying Motion to Strike Plaintiffs' Untimely Opposition to Defendants' Motion Allowing Release of Restrained Funds (Related Doc # 309) (Richards, Beverly) (Entered: 02/27/2007)
36	02/27/07	312	Motion to Allow Defendants' to Supplement, with Documents Submitted "Under Seal," the Affidavit of Rauf Ashraf Submitted in Support of Motion of Emphyrean Defendants for an Order Allowing Release of a Portion of the Restrained Funds in Order to Complete the Process of Retention of Experts and for Legal Fees filed by Jeffrey A. Denner on behalf of the Defendants. with hearing to be held on 3/14/2007 at 10:00 AM at Location to be announced (Denner, Jeffrey) (Entered: 02/27/2007)
37	03/09/07	314	Motion to Allow Defendants' to Supplement with Documents Submitted UNDER SEAL the (First) Supplemental Affidavit of Rauf Ashraf Submitted in Support of Motion of Emphyrean Defendants for an Order Allowing Release of Portion of the Restrained Funds in Order to Complete the Process of Retention of Experts and for Legal Fees filed by Jeffrey A. Denner on

			behalf of the Defendants. (Attachments: # 1 Supplemental Affidavit or Rauf Ashraf# 2 Exhibit to Affidavit) (Denner, Jeffrey) (Entered: 03/09/2007)
38	03/13/07	316	Transcript Of Hearing Held On January 9, 2007 At 11:00 AM, Re: Motion To Compel Production Of Documents; Motion To Purge Contempt Filed By Defendant Rauf Ashraf; Opposition Filed By Plaintiffs' Objection To Defendants' Motion To Purge Contempt; Plaintiffs' Objection To Defendants' Motion To Compel Production Of Documents filed by TypeWrite Word Processing Service. (Braithwaite, Kenishia) (Entered: 03/23/2007)
39	08/22/07	332	Memorandum of Law Supplementing Defendants' Opposition to Plaintiffs' Motion for Summary Judgment (related document(s) 293) filed by Jeffrey A. Denner on behalf of the Defendants. (Attachments: # 1 Exhibit A) (Denner, Jeffrey) (Entered: 08/22/2007)
40	08/29/07	333	Opposition / Plaintiffs' Opposition To Defendants' Belated Attempt To Open Up The Summary Judgment Record And To Raise New Legal Arguments (related document(s) 332) filed by Lester M. Kirshenbaum on behalf of Official Committee of Unsecured Creditors of MarketXT Holdings Corp.. (Kirshenbaum, Lester) (Entered: 08/29/2007)
41	10/12/07	338	Memorandum Opinion Signed on 10/12/2007 Regarding Motion for Summary Judgment and Restrained Funds (related document(s) 278 , 251) (Porter, Marguerite) (Entered: 10/12/2007)
42	10/19/07	339	Notice of Settlement of an Order / Notice of Settlement of Judgment and Order (related document(s) 338) filed by Lester M. Kirshenbaum on behalf of Official Committee of Unsecured Creditors of MarketXT Holdings Corp.. Objections due by 11/8/2007, (Attachments: # 1 Proposed Final Judgment and Order)(Kirshenbaum, Lester) (Entered: 10/19/2007)
43	10/23/07	341	Notice of Settlement of an Order (related document(s) 338) filed by Lester M. Kirshenbaum on behalf of Alan Nisselson, Official Committee of Unsecured Creditors. (Attachments: # 1 Proposed Order) (Kirshenbaum, Lester) (Entered: 10/23/2007)

44	10/24/07	342	Notice of Settlement of an Order (related document(s) 338) filed by Lester M. Kirshenbaum on behalf of Official Committee of Unsecured Creditors of MarketXT Holdings Corp.. Objections due by 11/13/2007, (Attachments: # 1 Proposed Invasion of Funds Order)(Kirshenbaum, Lester) (Entered: 10/24/2007)
45	11/07/07	345	Objection to [Proposed] Final Judgment and Order (related document(s) 339) filed by Jeffrey A. Denner on behalf of the Defendants. (Attachments: # 1 Exhibit Z) (Denner, Jeffrey) (Entered: 11/07/2007)
46	11/08/07	347	Objection to [Proposed] Order (related document(s) 341) filed by Jeffrey A. Denner on behalf of the Defendants. (Denner, Jeffrey) (Entered: 11/08/2007)
47	11/09/07	348	Final Judgment and Order signed on 11/9/2007. JUDGMENT INDEX NUMBER BC 07.0220 (Rouzeau, Anatin) (Entered: 11/09/2007)
48	11/12/07	349	Objection to Proposed Order Denying Motion to Invade Restrained Funds (related document(s) 342) filed by Jeffrey A. Denner on behalf of the Defendants. (Denner, Jeffrey) (Entered: 11/12/2007)
49	11/14/07	350	Order Signed on 11/14/2007 Denying Motion to Invade Restrained Funds (Related Doc # 278) (Porter, Marguerite) (Entered: 11/14/2007)
50	11/20/07	354	Order Signed on 11/20/2007 Regarding Memorandum of Opinion on the Summary Judgment Motion (related document(s) 341 , 338 , 251) (Porter, Marguerite) (Entered: 11/20/2007)

The Parties

The appellants and appellees, and the names and addresses of their attorneys, are as follows:

APPELLANTS: Empyrean Investment Fund, LP, Empyrean General Partner, LLC, Ash Master Fund II, LLC, Ashe Master Fund, LP, Ash Fund, LP, f/k/a Ash Capital Management, Ash General Partner, LLC, Ash Offshore Fund, Ltd, Ash General Partner Offshore, Ltd, et al.

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Dated: August 20, 2008
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Respectfully submitted,
EMPYREAN INVESTMENT FUND, LP et al
By and through their attorneys,

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Certificate of Service

I, Daniel C. Reilly, hereby certify that on this the 20th day of August 2008, I caused a true copy of the foregoing *Statement of Issues and Designation of Record on Appeal*, to be served electronically upon all parties registered with ECF for this matter.

/s/ Daniel C. Reilly

Daniel C. Reilly